



THE REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT
AT NAIROBI
ELC CASE NO 167 OF 2010

JOHN PATRICK MACHIRA1ST PLAINTIFF

DIANA WAIRIMU MACHIRA.....2ND PLAINTIFF

- VERSUS -

SIMON KARANJA WAINAINA 1ST DEFENDANT

JOSEPH KURIA WAINAINA.....2ND DEFENDANT

(Sued as Personal Representatives of the late Hezekiel Wainaina Kamau)

MARGARET MUTHONI MWANGIAPPLICANT

RULING

1. The plaintiffs initiated this suit through a plaint dated 7/4/2010. Their case was that, through a sale agreement dated 14/12/2009, the late Hezekiah Wainaina Kamau (**the deceased**) sold to them a portion of land measuring 1¼ acres which was to be parceled out of Land Parcel Number **Nyandarua/ South Kinangop/8671**. The purchase price was Kshs 825,000. They paid the agreed deposit of Kshs 180,000 and were ready to complete the contract. The deceased parceled out the 1¼ acre portion as **Nyandarua/South Kinangop/9166**. Instead of the deceased completing the sale, he attempted to sell the already sold parcel of land to a third party. Aggrieved, they brought this suit against the deceased, seeking among other reliefs, injunctive and specific performance orders against the deceased. Upon the deceased's demise, the current defendants were brought on board as his personal representatives.

2. About ten (10) years after the suit was filed, Margaret Muthoni Mwangi brought a notice of motion dated 9/10/2020 seeking to be joined in the suit as a 2nd defendant. The said application is the subject of this ruling. The application was supported by her affidavit sworn on 9/10/2020. Her case was that she entered into a purchase agreement dated 6/3/2010 with the deceased, relating to Title Number **Nyandarua/South Kinangop/ 9166 [the suit property]**. The land was, however, not transferred to her because the plaintiffs lodged a caution against the title. She contended that her joinder would enable the court to determine all the issues placed before it.

3. The plaintiffs opposed the application through grounds of opposition dated 24/2/2021. Their case was that they had no claim against the applicant and that they were strangers to the alleged sale agreement dated 6/3/2010 between the deceased and the applicant. They added that the applicant had acknowledged that there was a prior agreement between the deceased and the plaintiffs hence she should direct her claim against the estate of the deceased.

4. The application was canvassed through written submissions dated 15/3/2021, filed by the firm of **Kamotho Njomo & Co Advocates**. Counsel for the applicant submitted that the applicant had sufficient interest in the subject matter of this suit because she entered into a sale agreement with Hezekiah Wainaina Kamau for the purchase of the suit property. Counsel cited the decisions in; (i) **Medish Kenya Limited v Pharmacy & Prisons Board & another (2009) eKLR**; and (ii) **Nasibi Aore v Bonny Musembe & another Ex-parte Jane Omutsani (2007) eKLR**, among other cases, and urged the court to grant the plea in the interest of justice.

5. The plaintiffs filed written submissions dated 9/4/2021 through the firm of Kimondo Mubea & Company advocates. Counsel for the plaintiffs submitted that a party can only be joined in a suit if his or her presence will assist the court to effectually and completely adjudicate the matters in dispute. Counsel urged the court to dismiss the application.

6. I have considered the application together with the response thereto and the parties' respective submissions. I have also considered the relevant legal framework and principles applicable to the key question in this application. The key question falling for determination in this application is whether the applicant has satisfied the criteria upon which one is joined as a defendant in a suit.

7. Jurisdiction to grant an order of joinder of an applicant as a defendant is exercised within the framework of **Order 1 rule 3** of the Civil Procedure Rules which provides as follows:-

“3. All persons may be joined as defendants against whom any right to relief in respect of or arising out of the same act or transaction or series of acts or transactions is alleged to exist, whether jointly, severally or in the alternative, where, if separate suits were brought against such persons any common question of law or fact would arise.”

8. The plaintiff's suit is entirely a plea for an order of specific performance. The plaintiffs seek to enforce a contract between them and the deceased. The applicant was not a party to that contract. The plaintiffs are categorical that they have no cause of action or claim against the applicant and they cannot make her a defendant in a suit that seeks the enforcement of a land sale contract that she was not privy to.

9. In seeking to be joined as a defendant, the applicant is waving a contract which she alleges she entered into after the deceased had sold the suit property to the plaintiff. It does therefore emerge that the applicant wants to use the plaintiff's suit as the platform on which to ventilate a claim or a right which she should have ventilated on the platform of her own suit. It is not clear why she seeks to use the platform of the plaintiff's suit to ventilate a claim she should have ventilated independently. What is clear is that her agreement is dated 6/3/2010. If she did not institute a suit to enforce her own contract within 6 years, there is doubt that she can bring an independent suit to enforce it.

10. Would it be proper to admit the applicant as a defendant in the plaintiff's suit and accord her a platform that she lost upon expiry of six years? I do not think that would be proper. She had the opportunity to initiate a suit to enforce her contract. She appears to have elected not to do so. She should not be allowed to be a partisan litigant in a dispute relating to enforcement of a contract she was not privy to. It is therefore the finding of the court that the applicant has not satisfied the criteria for joinder as a defendant as spelt out under Order 1 rule 34 of the Civil Procedure Rules.

11. The court will, in the circumstances, only admit the applicant as an interested party within the framework of Order 1 rule 10(2) of the Civil Procedure Rules but will not allow her the liberty to initiate a claim on the platform of the plaintiff's suit. Costs of the application shall be in the cause.

12. Consequently, the notice of motion dated 9/10/2020 is disposed in the following terms:

a. Margaret Muthoni Mwangi's plea to be joined as a 2nd defendant in this suit is rejected.

b. Margaret Muthoni Mwangi shall be admitted as an interested party but shall not have the liberty to initiate a claim on the platform of this suit.

c. Costs of the application shall be in the cause.

DATED, SIGNED AND DELIVERED VIRTUALLY AT THIKA ON THIS 19TH DAY OF OCTOBER, 2021

B M EBOSO

JUDGE

In the presence of: -

Mr Mungai for the Plaintiffs

Mr Manyara for the 2nd Defendant

Court Assistant: Lucy Muthoni

NOTE:

This application was heard and a ruling date fixed when I was stationed at Nairobi (Milimani) Environment and Land Court Station. Subsequent to that, I was transferred to Thika Environment and Land Court Station. This is why I have delivered the ruling virtually at Thika.

B M EBOSO

JUDGE